U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, N.W.
Washington, D.C. 20001-8002

DATE: April 5, 1999
CASE NO.: 1996-INA-0217

In the Matter of:

CIBER, INC.
Employer

On Behalf Of:

FIDEL POSADAS VINLUAN
Alien

Certifying Officer: Paul R. Nelson, Region IX

Appearance: Roni P. Deutsch, Esq.
For the Employer/Alien

Before: Huddleston, Jarvis, and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing

working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On May 27, 1994, CIBER, Inc. ("Employer") filed an application for labor certification to enable Fidel P. Vinluan ("Alien") to fill the position of Systems Analyst (AF 46-239). The job duties for the position are:

> Provide computer consultancy services, specializing in projects involving financial systems and programs, such as financial controls and financial purge in a global accounts payable application. Plan, design and develop applications and write programs. Develop applications and programs using COBOL, COBOL II, ASSEMBLER, PL/I, IMS DB/DC, CICS/VS, DL/I and DB2. Design, develop and maintain systems procedures using MVS, TSO, and DOS/VS. Create screen definitions using MFS.

The requirements for the position are a Bachelor of Science Degree in Computer Science or Engineering, and four years experience in the job offered or four years experience in the related occupation of "Computer Consultancy Work." Other Special Requirements are:

> Experience must include applications programming for financial applications, and software design and development in the environments mentioned above. These requirements are essential to the performance of the job offered and have arisen solely and directly out of business necessity. These skills are an integral and essential part of this job, and it is not feasible to hire an individual without these skills.

The CO issued a Notice of Findings on March 28, 1995 (AF 38-45), proposing to deny certification on the grounds that four years experience in the job offered was unduly restrictive in violation of 20 C.F.R. § 656.21(b)(2)(i)(A), as individuals with two years appropriate experience are considered qualified pursuant to the *Dictionary of Occupational Titles* (DOT). The Employer was notified that it must either change the requirement or submit evidence to establish the business necessity of the requirement. The CO also found that U.S. applicants Bernard Steinberg, Glen Pape, and Grace Cayco were qualified by the position by the nature of their education, training and experience, and the Employer failed to interview them in violation of § 656.24(b)(2)(ii). In addition, the CO noted that applicants Pape and Steinberg were laid off by the Employer, and it must document how the nature and extent of the layoffs and any re-

[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

employment or relocation plans. The CO also notified the employer that it must re-contact and interview Ms. Cayco.

Accordingly, the Employer was notified that it had until May 2, 1995, to rebut the findings or to cure the defects noted.

In its rebuttal, dated May 15, 1995 (AF 12-38), the Employer submitted a statement from a Robert Dahlgren, Vice President and copies of selected pages from the DOL *Occupational Outlook Handbook.* Mr. Dahlgren contended that because of the sophistication of the work, it is not feasible to hire individuals with less than four years experience, and that the *Occupational Outlook Handbook* discusses a certification that can be issued to professionals in the field who possess five years experience. He stated that Mr. Steinberg and Mr. Pape were not "laid-off" but terminated because "their work product was below satisfactory." The Employer also stated that it has hired 88 new employees between May 1994 and May 1995. Regarding Ms. Cayco, Employer states that,

> At the request of the Certifying Officer, we did re-contact Ms. Grace Cayco. During the course of our conversation, Ms. Cayco realized and acknowledged that it was not CIBER who had said she would be re-contacted but rather another potential employer to whom she had sent her resume. Ms. Cayco again stated that at this time she is not interested in the instant position. She stated she is looking for work on a mid-frame, not a mainframe computer. (AF 14).

The CO issued the Final Determination on July 26, 1995 (AF 9-11), denying certification because the Employer failed to document of its assertions regarding U.S. applicants Steinberg and Pape. More specifically, the CO stated that the Employer did not document that they were terminated for poor work performance or did not have the required credentials as listed on their resumes. Accordingly, the CO found the Employer remained in violation of § 656.24. The CO did not comment further regarding Ms. Cayco.

On August 28, 1995, the Employer requested review of the denial of labor certification (AF 2-8). The CO denied reconsideration and on September 8, 1995, forwarded the record for review.

Discussion

The CO has denied certification pursuant to 20 C.F.R. § 656.21(b)(6), on the grounds that the employer has not established that the rejection of U.S. workers, Bernard Steinberg and Glen Pape were for lawful reasons. The CO notes that 20 C.F.R. § 656.24(b)(2)(ii), provides that a U.S. worker shall be considered qualified for the position if , based upon his education, training, and experience, the worker is able to perform the job in a normally accepted manner. In general, an applicant is considered qualified for a job if he or she meets the minimum requirements specified for that job in the labor certification application. *United Parcel Service*, 90-INA-90 (Mar.28, 1991); *Mancil-las International Ltd..*, 88-INA-321 (Feb. 7, 1990); *Microbilt Corp.*, 87-INA-635 (Jan. 12, 1988). An employer unlawfully rejects a U.S. worker who satisfies the minimum requirements specified on the ETA 750A and in the advertisement

for the position. *American Café*, 90-INA-26 (Jan. 25, 1991); *Cal-Tex Management Services*, 88-INA-492 (Sept. 19, 1990); *Ricco Management*, 88-INA-509 (Nov. 21, 1989); *Dharma Friendship Foundation*, 88-INA-29 (Apr. 7, 1988). The burden of proof for obtaining alien labor certification lies with the employer. 20 C.F.R. § 656.2(b).

In this case, the Employer stated that it rejected U.S. applicants Pape and Steinberg without an interview because they had been previously employed by the Employer and were terminated for poor job performance. The CO denied certification because these applicants appeared to be qualified for the position based on their resumes, and the Employer failed to document its statements regarding their terminations. The Employer argues that its statement regarding the work record of the U.S. applicants should be considered as a poor reference from a former employer.

Although the Employer's written statement constitutes documentation that must be considered, a bare assertion without supporting evidence is generally insufficient to carry an employer's burden of proof. *See Inter-World Immigration Service*, 88-INA-490 (Sept. 1, 1989); *A.V. Restaurant*, 88-INA-330 (Nov. 22, 1988). Moreover, while poor references constitute a lawful, job-related reason for rejection of a U.S. applicant, those references must be documented. *See Petit Jean Poultry*, 94-INA-318 (August 15, 1996); *Androscoggin Jr. - Sr. Camp For Boys*, 94-INA-216 (Nov. 2, 1995); *United Signal Company*, 88-INA-422 (Oct. 25, 1989); *Norman Industries*, 88-INA-202 (July 29, 1988). In this case, the Employer could have easily substantiated its assertions by supplying copies of its own company records regarding the alleged poor performance of these two applicants, but did not provide anything other that its bare assertion.

Accordingly, we agree with the CO's determination that the Employer has failed to adequately document lawful, job-related reasons for rejecting these U.S. workers.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such a review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with the supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.